Citation: PJ et al v. The Attorney General of Canada et al
2000 BCSC 1780

Date: 20001221

Docket: 97-4129
99-4788
99-4787

Registry: Victoria

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IN THE SUPREME COURT OF BRITISH COLUMBIA

97-4129
BETWEEN:

PJ,IA,CG,HJ,JJ,LJ,RJ,DJ,AMJ,ES,WS,AS,JW

PLAINTIFFS

AND:

**THE ATTORNEY GENERAL OF CANADA
THE ROMAN CATHOLIC BISHOP OF VICTORIA
THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, GLENN DOUGHTY, JOHN DOE I, JOHN DOE II, FATHER LAWRENCE MACKEY BROTHER FURLONG, SISTER MARY PETER, FATHER DUNLOP, FATHER TURNER, JANE DOE I, JANE DOE II, SISTER HELENA, BROTHER MURPHY, LES PERES MONTFORTAINS (A.K.A. SOCIETY OF MARY OF MONTFORT), SISTER MARY DONNA AND SISTER MARY RITA**

DEFENDANTS

AND:

**THE ATTORNEY GENERAL OF CANADA
THE ROMAN CATHOLIC BISHOP OF VICTORIA, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, GLENN DOUGHTY, JOHN DOE I, JOHN DOE II, J. MASSELL, J. MACDONELL, T. LOBSINGER, IRENE MACADAMS, SISTER MARY PETER, BROTHER FURLONG, P.J. COLLINS, FATHER LAWRENCE MACKEY, FATHER J. CAMIRAND, BROTHER MURPHY, JANE DOE I, JANE DOE II, SISTER MARY RITA, FATHER TURNER, SISTER HELENA, SISTER MARY DONNA, LES PERES MONTFORTIANS (a.k.a. Society of Mary of Montfort)**

THIRD PARTIES

99-4787
BETWEEN:

SHEILA MARIE PETER, MEGAN EDWARDS, AUDREY MILENA TOTUS BY HER GUARDIAN AD LITEM VINCENT AARON SYLVESTER, MARK JONATHAN LANCE PETER BY HIS GUARDIAN AD LITEM SHEILA MARIE PETER AND ANGELA ANASTASIA ROSE PETER BY HER GUARDIAN AD LITEM SHEILA MARIE PETER, DONNA ANN MABEL THOMAS, DARNELL DION SAM AND TIMOTHY ALLAN SAM

PLAINTIFFS

AND:

GLENN DOUGHTY, "JOHN DOE", THE ORDER OF THE OBLATES OF MARY IMMACULATE, THE ROMAN CATHOLIC DIOCESE OF VICTORIA AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

DEFENDANTS

99-4788
BETWEEN:

DJA,JAA,JFC,RTC,BMD,DCD,MGD,TSD,FME,AG,RMG,RMM,EMR, WPGS,RRS,RPS,BS,DLS, AND GT

PLAINTIFFS

AND:

GLENN DOUGHTY, "FATHER FRANCIS", "BROTHER KINNEY", "FATHER KURTZ", "FATHER LECLAIR", LAWRENCE MACKIE, FRANCIS MOULIN, "FATHER MURPHY", "SISTER MARY MARGARET", "FATHER TURNEY", "FATHER WILLIAMS", "JOHN DOE", THE COMPANY OF MARY, THE ORDER OF THE OBLATES OF MARY IMMACULATE, THE ROMAN CATHOLIC BISHOP OF VICTORIA and HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

DEFENDANTS

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REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE DORGAN

2000 BCSC 1780 (CanLII)

Counsel for PJ et al	Scott Hall
Counsel for DJA et al and Peter et al	David Paterson
Counsel for Attorney General of Canada	John J.L. Hunter, Q.C.
Counsel for the Oblates of Mary Immaculate in the Province of B.C., and the Montfort Fathers	Mobina Jaffer, Q.C. and Azool Jaffer-Jeraj
Counsel for Bishop of Victoria	Frank D. Corbett
Counsel for R.C.M.P.	E. David Crossin, Q.C. and Susan M. Coristine
Counsel for Intervenor, the A.G.B.C.	Gil D. McKinnon, Q.C. Myron Claridge
Date and Place of Hearing/Trial:	September 7 & 8, 2000 Vancouver, BC October 5, 2000 Victoria, BC

[1] On January 25, 2000, the plaintiffs filed this motion to compel production of documents presently held in court pending further order. The application is brought pursuant to Rule 26 for the R.C.M.P. (a third party) to produce the documents to the plaintiffs. The Attorney General for British Columbia (“A.G.B.C.”) was granted intervenor status.

[2] The actions in which the motion is brought relate to the plaintiffs' claims of acts of abuse they allege were committed upon them during their attendance at the Kuper Island residential school located near Chemainus, British Columbia. The plaintiffs attended the school from the 1930s until the mid-1970s. The 32 plaintiffs in the ***PJ et al*** and ***DJA et al*** actions were all former students of the school. They bring this civil action for damages in tort, contract and for breach of trust and fiduciary duty against the Bishop of Victoria, the Oblates of Mary Immaculate in the Province of British Columbia, Glenn Doughty (a Roman Catholic brother) and other individual defendants, Her Majesty the Queen in Right of Canada, Sister Mary Donna and Sister Mary Rita, both of the Sisters of St. Anne. The plaintiffs in the ***Peter et al*** action are spouses and children of former students of the school, and bring their claims under the ***Family Compensation Act***.

[3] The issue relating to disclosure of documents is pertinent to all three actions and has been outstanding for approximately 1 year. There are 431 documents in issue comprising approximately 2,500 pages. On February 7, 2000, the parties, the R.C.M.P. and the A.G.B.C. agreed to and filed a consent order. Under that consent order the documents in dispute were deposited with the court pending further

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agreement or court order, subject to claims of privilege and public interest immunity. By its terms the documents would be listed and some, or portions, of them would be released to the parties. The consent order directed the R.C.M.P. to edit the documents and provide the edited versions to plaintiffs' counsel. The plaintiffs now seek disclosure of unedited versions of the documents, with conditions attached.

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[4] The following background facts are not in dispute:

1. In 1994, as a result of a number of allegations of abuse at various residential schools, the R.C.M.P. formed the Native Indian Residential School Task Force ("NIRS Task Force") to facilitate investigation of the allegations.

2. Since April 1998, Constable Thatcher has been the file co-ordinator of the NIRS Task Force.

3. In early 1998, and in order to comply with disclosure obligations under the Rules, Ms. Jorgenson of the Department of Justice, counsel for Canada, made enquiries of federal departments and agencies regarding documents relevant to the issues raised in the Kuper Island litigation that they

might have. In so doing, she contacted Constable Thatcher.

4. By August 1998, Ms. Jorgenson and a representative from the litigation management branch of the Department of Indian Affairs and Nothern Development were given complete access to the NIRS Task Force documents. These are the documents in dispute in this application.

5. The defendant Canada relied on the documents for a number of purposes, including to draft its pleadings in these actions.

6. The plaintiffs have had access to extensively edited versions of the documents only.

7. On April 3, 1995, one of the named individual defendants, Glenn Doughty, was convicted of 3 charges of gross indecency for acts committed against three of the plaintiffs in these actions. He served the sentence imposed and was paroled on November 18, 1997. Mr. Doughty was the subject of further R.C.M.P. criminal investigation and additional charges have now been laid against him based on complaints of sexual assault from other

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plaintiffs named in these actions. I am told that approximately 1,300 pages of the documents relate to the outstanding criminal charges against Mr. Doughty. Obviously, he may be entitled to disclosure of some or all of these documents in the criminal proceedings. Counsel for the Oblates and the Montforts in these actions also acts for Mr. Doughty in his criminal proceedings. As a result, another of the defendants in this action may have access to documents not disclosed to the plaintiffs.

8. As a result of the R.C.M.P. investigations of allegations of abuse at various residential schools in this province, the Provincial Residential School Project (“PRSP”) was developed with Chief Joseph as its executive director. He has sworn two affidavits on this application.

9. On June 21, 1995, through the PRSP, a protocol agreement (the “Agreement”) was entered into to formalize the commitment made by the Protocol Committee. The Protocol Committee is comprised of representatives from Aboriginal groups, the federal and provincial governments and the R.C.M.P. Members

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from each of these groups are signatories to the Agreement.

10. The Agreement, among other things, defines a protocol for the R.C.M.P. to follow when investigating allegations of abuse within residential schools. Under the Agreement, any witness or complainant who comes forward with information receives an unusual degree of control over what use, if any, will be made of the information he or she provides. Control over the information by those who provide it, confidentiality and sensitivity to the vulnerability of possible victims, are among the hallmarks of the Agreement.

[5] The February 7, 2000 consent order reads as follows:

> **THIS COURT ORDERS THAT**, pursuant to Rule 26 of the B.C. *Rules of Court*:
>
> 1) Chief Superintendent Bass of the R.C.M.P.'s "E" Division Major Crime Section will produce the following documents:
>
> a) an unedited copy of any statements and recordings made to the R.C.M.P. by the Plaintiffs regarding any acts of physical or sexual abuse that occurred at or near Kuper Island Residential School ("the School"), which statements and recordings are being released to counsel for each of the parties to these actions with the consent of those Plaintiffs or guardians ad litem and which copy will be reviewed only by the Plaintiffs who made the

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statement or recording and by any counsel acting for a party in these proceedings. No further use of these unedited statements will be made without leave of the Court and, in particular, counsel will not show the unedited statement or recording to his/her client;

b) a second copy of the statements referred to in subparagraph 1(a), from which the identities of all non-parties are edited out, will be provided to counsel for each of the parties to these actions and may be distributed to any experts engaged by counsel in this litigation and may be put to the maker of the statement or recording during examination for discovery. No further use of these edited statements will be made without leave of the Court and, in particular, counsel will not show the edited statement or recording to his/her client, unless the client is the maker of the statement or recording.

2) Counsel for Canada will, in respect of the documents provided to the Department of Justice from the R.C.M.P.'s "E" Division in the Fall of 1998 and itemized in the letter of Constable Stephen Thatcher to the Department of Justice dated November 10, 1998, ("the Documents"):

a) on Tuesday February 8, 2000, place all Documents (and any copies and notes thereof) into the custody of the B.C. Supreme Court, Victoria Registry, to be sealed until dealt with in accordance with the law and the claims of privilege and public interest immunity asserted in the Affidavits filed by the R.C.M.P. and the Attorney General of British Columbia on February 3, 2000;

b) by Monday, May 1, 2000, the R.C.M.P. will report to the parties on the status of the Kuper Island criminal investigations in accordance with the commitments made by Chief Superintendent Bass in his Affidavit filed in these proceedings;

c) on or before May 15, 2000 the R.C.M.P. will release those non-privileged and relevant

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Documents, or portions thereof, not covered by a claim of public interest immunity, which can be expeditiously provided to the parties;

d) on May 15, 2000, the R.C.M.P. will provide a further report to the parties proposing a schedule for the release of any further non-privileged and relevant Documents, not covered by a claim of public interest immunity, that have not already been released under subparagraph (c) above, and will set out a proposal concerning the ongoing restrictions placed upon the plaintiffs' statements under paragraph 1(b) above;

e) all residual Documents not released under subparagraphs (c) & (d) above will be listed by the R.C.M.P. in a manner that generally describes them, without specifying their contents, and a claim of privilege or public interest immunity or lack of relevance will be made in relation to this residual class;

f) it will be open to any of the parties to seek a reference to a Referee of any outstanding issues that can more appropriately be dealt with by a Referee or to bring an application under Rule 26 at any point after May 15, 2000;

g) the present Applications will be adjourned to [June 5 & 6] 2000.

3) The R.C.M.P. "E" Division Major Crime Section will treat any pre-existing or new investigative documents which come to its attention in relation to the Kuper Island criminal investigations in accordance with the procedures set out above in paragraphs 2(b) to 2(g).

4) Upon an appropriate request being made by any of the parties to this litigation pursuant to the *Privacy Act*, disclosing that there is reason to believe that any additional documents relevant to these proceedings may be found in R.C.M.P. files, the R.C.M.P. will cause a search to be made for the said documents and, after consultation with counsel for the Attorney General of British Columbia (Criminal Justice

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> Branch) in relation to criminal protection issues, will prepare a response within a reasonable time; where permitted by the *Privacy Act*, the R.C.M.P. will release those non-privileged and relevant documents, or portions thereof, not covered by a claim of public interest immunity.
>
> ...

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[6] The most recent criminal charges against Mr. Doughty were laid after the February 7, 2000 consent order. The timing of the R.C.M.P. investigation, including that which led to the Doughty charges was such that the time frame in the consent order could not met. By both agreement and court order, the R.C.M.P. have now listed all of the documents deposited with the court. That list appears as Exhibit “A” to Constable Thatcher’s affidavit filed August 25, 2000. Various immunities and privileges and other justifications are claimed in relation to the documents contained in this list to refuse disclosure to the plaintiffs.

[7] The documents referred to in the consent order can be seen to fall into two classes. The first class includes documents about individuals (alleged victims and alleged offenders) that pertain directly to the allegations in the statements of claim. The second class includes general documents that may, according to the plaintiffs, have an effect on issues such as what knowledge of alleged wrongdoing

any of the defendants had at the relevant times. In other words, they may be relevant to liability.

[8] The situation is simply this: the defendant Canada, by complying with its obligations to list documents in its control, sought access to documents in the R.C.M.P.'s possession. In turn, the R.C.M.P., often advised by the Department of Justice, turned the documents over to that department as well as to the Department of Indian Affairs and Northern Development. While there is no suggestion of ulterior motives in the unfolding of these events, the consequence is that one party to this litigation (the defendant Canada) has had access to the documents. Another of the defendants (Mr. Doughty) could obtain access to many of them in the context of the criminal proceedings. The plaintiffs, however, have only had access to edited versions of the documents.

[9] Mr. Paterson brings this application on behalf of the plaintiffs in the ***DJA et al*** action and the ***Peter*** action. Counsel for the plaintiffs in the ***PJ et al*** action and counsel for all of the defendants support the application, although counsel for the defendant Canada takes no clear position. Mr. McKinnon, on behalf of the A.G.B.C. as intervenor, and counsel for the R.C.M.P. both oppose the application.

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[10] In this application much emphasis was placed on the need to develop, nurture and maintain mutual respect and trust between the R.C.M.P. and the aboriginal community. The necessity of mutual trust is particularly important in relation to issues arising from residential schools.

[11] The R.C.M.P. is clearly concerned about its ongoing relationship with members of the aboriginal community. It is also concerned about its obligations in respect of civil litigation in the numerous lawsuits in this Province and across the country arising from the residential school experience. The A.G.B.C. and the R.C.M.P. share concerns about disclosure of information in civil proceedings, and the impact such disclosure could have on ongoing criminal investigations, and on criminal charges, potential and existing.

[12] The arguments advanced by the R.C.M.P. and the A.G.B.C. in opposition to the motion may be generally described as public interest arguments. Specifically, the R.C.M.P. has asserted the following privileges and immunities:

1. Solicitor-client and litigation privilege.

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2. Some people who gave information or otherwise are named in the documents, and their identities are therefore protected under the ***Young Offenders Act***.

3. Informant privilege – that the documents contain information that could directly or indirectly identify confidential police informants.

4. That the ***Freedom of Information and Protection of Privacy Act***, ***Privacy Act*** and ***Access to Information Act*** prevent disclosure to the plaintiffs.

5. Public interest immunity.

6. A general common law privilege.

[13] The A.G.B.C. joins in the arguments in respect of privilege and immunity raised by the R.C.M.P and also asserts a general litigation privilege, arguing that all the documents were created or gathered in anticipation of litigation, that is, during the course of criminal investigations.

Solicitor-Client Privilege and Litigation Privilege

[14] The plaintiffs acknowledge that documents numbered 31, 35, 36, 43, 74 in Exhibit “A” to the Thatcher affidavit, earlier referred to, contain legal opinions provided by Crown counsel. The plaintiffs agree that these documents are

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subject to the solicitor-client privilege and withdraw their application in respect of them.

[15] The assertion of litigation privilege by the A.G.B.C. is rejected. In my view, any litigation privilege, if it did exist, was waived when the R.C.M.P. handed over the documents to the defendant Canada and a representative of the Department of Indian Affairs and Northern Development, and by the terms of the 7 February, 2000 consent order.

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Young Offenders Act

[16] Clearly, the Act does not apply to the issues before the court. Counsel for the R.C.M.P. and for the A.G.B.C. basically conceded this point by the end of submissions.

Informant Privilege

[17] Counsel for the R.C.M.P. and the A.G.B.C. submit that the documents in issue cannot be disclosed because to do so would identify police informants. It is clear that where the informant privilege operates, it is a significant obstacle to

complete disclosure. Generally the only exception is the "innocence at stake" exception: ***R. v. Liepart*** (1997), 112 C.C.C. (3d) 385 (S.C.C.).

[18] The R.C.M.P. and A.G.B.C. contend that once a person is identified as an informer, the informer privilege applies automatically. In ***R. v. Gordon*** (1999), 136 C.C.C. (3d) 64 (Ont. C.J.), O'Connor J. discusses when a person will be considered an "informer" at 76:

> An informer is a person who provides the police relevant information useful in the prosecution of an offence whose identity the Crown seeks to keep confidential for one or more of several specific and justifiable reasons.

[19] The R.C.M.P. claim that the people who gave information to the police in the context of these investigations are police informers. According to the R.C.M.P. they gave information to the police that was and is relevant to investigations and prosecutions, and the Crown seeks to keep their identities confidential to encourage further reporting from the communities.

[20] However, the circumstances of each case and the rationale for the informant privilege must be considered, either when determining if someone is in fact an "informer", or when determining if the privilege claimed should be confirmed.

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[21] Despite O'Connor J.'s broad definition of "informer" provided above, he discusses the justification for the privilege at 76 - 77:

> First, it may be necessary to protect the informer from possible harm or retribution by those about whom he has informed. This reason must be specific to the matter being tried and founded in the facts of the case before the court. That is, there must be some evidentiary basis for believing harm will befall the source if his identity is revealed. This may be related to expressed threats or the demonstrated propensity of the accused to violence in the past. In this analysis the wishes of the source, a person often closely involved with the accused, will have significant weight, as noted by McLachlin J. in Liepart, supra.
>
> Second, the sanctity of informer privilege must be preserved to encourage others to provide information about criminal activity. This reason is general and need not have particular application in the case before the court.
>
> Other reasons for maintaining confidentiality of an informer's identity might include the need to preserve an ongoing investigation or to prevent disclosure of police investigative techniques.

According to O'Connor J., a person is not an "informer" requiring the privilege unless the circumstances discussed above necessitate the privilege.

[22] The first rationale O'Connor J. discusses is the need to protect an informer from possible harm or retribution. In this case, there was neither argument nor evidence that any person who gave the police information, could be harmed by

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someone connected to these proceedings if that information is disclosed to the plaintiffs.

[23] The R.C.M.P. contend that absence of risk is not a determining factor. As Hanssen J. states in ***R. v. 4-12 Electronics Corp.***, [1996] M.J. No. 79 (Man. Q.B.) (Q.L.), the Crown need not demonstrate risk to the informer for the privilege to apply.

[24] However, at paragraph 17 Hanssen J. goes on to state:

> … while the informer privilege applies even where no risk or prejudice to the informer is demonstrated, the presence or absence of a significant risk is an important factor for the court to take into account when it is called upon to balance the accused's interest is [*sic*] a fair trial against the public interest in non-disclosure.

[25] Therefore, while the absence of risk to a person who gave information should not automatically preclude the informant privilege from being confirmed, it should be a factor a court considers when determining whether or not the privilege is justified. I find there is no risk of harm from third parties to any person who gave information to the police. However, the other rationales O'Connor J. identified in ***R. v. Gordon,*** *supra*, must be considered.

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[26] The second rationale for the informant privilege identified by O'Connor J., is to encourage the public to give the police information about criminal activity. Disclosing an informer's identity might have a chilling effect on the public's willingness to do so.

[27] However, this rationale must be considered in light of the fact that one party to this litigation has had complete access to the documents in question. The goal of encouraging public reporting through maintaining confidentiality was violated when the R.C.M.P. shared these documents with the defendant Canada. I am satisfied that by imposing conditions on the plaintiffs' use of the documents, effect will be given to this important rationale while ensuring fairness in this litigation.

[28] The third rationale for the informant privilege is that the privilege protects ongoing police investigations. In my view, this rationale cannot, given the discussion about encouraging public reporting, stand on its own to prevent disclosure to the plaintiffs.

[29] While protecting ongoing investigations is an important concern, it is best dealt with under the public interest immunity claim because the R.C.M.P. has identified the specific documents to which that claim relates. Informant

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privilege is too broad and indiscriminate a tool to protect ongoing investigations in these circumstances.

[30] The submission that raises informant privilege as a bar to disclosure is not compelling.

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Privacy Act, Access to Information Act, and the ***Freedom of Information and Protection of Privacy Act***

[31] Section 8(1) of the ***Privacy Act*** states that "[p]ersonal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section." However, subsection 2(c) of section 8 states that personal information may be disclosed:

> ... for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information; ...

[32] Section 19(2) of the ***Access to Information Act*** states that while personal information collected by a government agency must not be disclosed, it may be disclosed in accordance with section 8(2) of the ***Privacy Act***.

[33] These statutes do not prohibit disclosure of the documents in circumstances before this court.

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Public Interest Immunity

[34] The main arguments against disclosure cluster under the umbrella of public interest immunity. The concept or principle of public interest immunity is based on a public duty not a right. The immunity is not absolute, that is, it does not create an absolute privilege that cannot be examined by the court. Rather, an assertion of public interest immunity requires the court to weigh various interests to consider what result would best reflect the interests of the public in relation to the issues before the court.

[35] In this case it is submitted that several interests justify the finding of public interest immunity. They are the need to:

i) observe the terms of the Agreement;

ii) protect confidential police sources;

iii) protect ongoing investigations and prosecutions;

iv) protect free and frank exchange of information;

v) ensure that information from third parties is not used for a purpose other than that for which it was obtained.

[36] When weighing these against other public interests, several factors must also be considered. They are:

1. The relevance and probative value of the evidence.

2. The effect non-disclosure would have on the public's perception of the administration of justice.

3. The subject matter of this litigation is civil rather than criminal.

4. That this case involves an allegation of government wrongdoing. It is appropriate to consider whether the claim for immunity may also be motivated by self-interest and not solely from a genuine concern for secrecy.

5. That one defendant in this case has had complete, unedited access to the documents, and considered them when it drafted its pleadings.

[37] The final factor defines the issue before the court. Normally the plaintiffs would be entitled to the same access that the defendants had to the documents.

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[38] The R.C.M.P. and A.G.B.C. contend that the documents in issue are of little relevance to the plaintiffs in this litigation. This court need not consider their assessment of relevance in this application; relevance is not for the R.C.M.P. or the A.G.B.C. to determine.

[39] In the case of ***Babcock v. Canada (Attorney General)*** (2000), 76 B.C.L.R. (3d) 35 (B.C.C.A.), the defendant originally disclosed several documents, and then 2 years later, objected to their disclosure. In its objection, the defendant raised the public interest immunity issue because the documents constituted cabinet confidences. While the Court of Appeal was considering s.39 of the ***Canada Evidence Act***, the section that allows the Clerk of the Privy Council to object to disclosure, the court concluded at p.44 that:

> The claim to a s.39(1) immunity for the 17 documents disclosed was waived when those documents were produced in this litigation and cannot be revived retroactively.

[40] Section 39 of the ***Canada Evidence Act*** states that where the disclosure sought is a cabinet confidence, disclosure shall be refused without examination of the document in question. Section 39 is obviously not an issue in this case. ***Babcock***, *supra*, is factually different from the case at bar, nevertheless its reasoning is of assistance.

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[41] It is also important to note that the motion before this court does not involve a claim under section 37 of the ***Canada Evidence Act***, which allows a Minister of the Crown to object to disclosure "by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest". Here, the A.G.B.C. not Canada opposes disclosure to the plaintiffs.

[42] In ***Leeds v. Alberta (Minister of the Environment)*** (1990), 69 D.L.R. (4th) 681 (Alberta Q.B.) the court, though faced with admittedly different facts, commented generally at p.688:

> ... that the clear trend in Canada is towards the concept of extensive disclosure of Crown documents to assist in the fair administration of justice as opposed to any blanket concept of non-disclosure under the rubric of a public interest immunity concept.

The court went on to state that where the Crown is a party to the litigation its assertion of public interest immunity must be scrutinized carefully because it is not just justice, but also the appearance of justice that is important. While in this case the Crown, as a defendant and party to the litigation, does not assert a claim of public interest immunity on this application, the A.G.B.C. does, as does the R.C.M.P., a Crown authority of national scope.

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[43] While there is authority that the Crown cannot waive the immunity because it is a public duty not a right: (see J. Sopinka et al in ***The Law of Evidence*** and ***Makanjuola v. Commissioner of Police***, [1992] 3 All E.R., 617 at 623) the court in ***Leeds***, *supra*, makes the following statement at 695:

> Public interest immunity is a privilege of the public which can be waived by the Crown as representative of the people. To hold otherwise would place any litigant opposing the Crown in the untenable position of being unable to rely on the Crown's production of documents, no matter how essential such documents were to their case ...

At 44 the Court of Appeal in ***Babcock***, *supra*, cites this statement from ***Leeds***, *supra*, with approval.

[44] There is no apparent reason why the observation of the court in ***Leeds*** should not be applied to both the provincial Crown and the R.C.M.P. in its assertion of public interest immunity in this case. In other words, assertions raised by each of them deserve to be carefully scrutinized even though they are not parties. Here, the R.C.M.P. gave the federal Crown, a defendant in this litigation, unfettered access to its documents. Will the appearance of justice be served by allowing an assertion of public interest immunity to block similar access to the same documents to another of the parties, namely, the plaintiff? Should the Crown in the form

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of the A.G.B.C., or the R.C.M.P., be entitled to retain a continuing right to raise the immunity interest, even after disclosure to one party to the litigation? Can a third party (the R.C.M.P.), disclose documents to a party (the defendant Canada), and then later reach back and claim privilege over those documents?

[45] Applying the principles from ***Babcock*** and ***Leeds***, *supra*, broadly, once documents are introduced into the litigation, a claim of public interest immunity later raised that effectively requires retroactive application, must be carefully analyzed regardless of who introduces the documents.

[46] With this discussion in mind, I now turn to the specific public interests upon which the R.C.M.P. and A.G.B.C. rely. All of the public interests relevant in this case overlap to some degree. In this analysis I assume that the claim of public interest immunity has not been waived.

Protocol Agreement

[47] The R.C.M.P. and the A.G.B.C. submit that many of the documents were created under the Agreement. They contend that respect for the Agreement is clearly in the public interest and that disclosure is antithetical to the purpose of the Agreement. The existence of the Agreement is obviously

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significant, however, there are additional factors of note, namely:

1. Some of the documents over which the public interest immunity claim is asserted were created long before the Agreement was signed.

2. The Agreement was entered into in order to promote ongoing dialogue between the aboriginal community, in this case on Kuper Island, and the R.C.M.P. The 40 plaintiffs in this litigation are all persons of aboriginal ancestry.

3. Chief Joseph is the Director of the Provincial Residential School Project. He is the lead contact person within the aboriginal community on residential school issues in the Province, and was involved in the creation of the Agreement. In his October 4, 2000 affidavit he says:

> I understand that the Applicants presently seek access only to the documents that were already provided to the Department of Justice by the RCMP. While the Provincial Residential School Project has passed a motion objecting to the RCMP supplying Residential School documents to the Department of Justice, the Provincial Residential School Project does not object to the application of the Plaintiffs for production of documents in the Kuper Island case that:

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> a. were already provided by the RCMP to the Department of Justice; and
>
> b. are relevant to the civil actions of the Plaintiffs bringing this application.
>
> Subject to the Court applying terms protecting the confidentiality of those materials.

4. Not all of the persons who came forward to give the R.C.M.P. information are members of the aboriginal community and, therefore, arguably, are not affected by the terms of the Agreement.

[48] In all the circumstances the public interest will be served by imposing conditions on the disclosure of the documents to the plaintiffs in a manner consistent with the purpose of the Agreement.

Police Informants

[49] Also under the rubric of public interest immunity, the R.C.M.P. and the A.G.B.C. assert that the court should prevent disclosure to protect confidential police sources. As noted earlier, there is no factual basis on which to find that any person who gave information to the police during the course of the investigations was an “informant”.

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[50] The claim of public interest immunity in order to protect police informants is weakened because it requires the court to balance competing interests, including those of the plaintiffs. The public interest in preventing disclosure is further weakened given the evidence of Chief Joseph, on behalf of the NIRS Task Force. He does not object to the disclosure to the plaintiffs. Further, the 40 plaintiffs who seek disclosure are directly or indirectly involved in or affected by the information contained in the documents. Finally, disclosure has already been made to the defendant Canada, which includes the Department of Justice and the Department of Indian Affairs and Northern Development. These facts dilute the R.C.M.P.'s claims for public interest immunity to protect informants to the extent that it is simply not compelling.

Ongoing Investigations and Criminal Prosecutions

[51] In Constable Thatcher's affidavit filed August 25, 2000, he identifies documents in category "1" as those that reveal information about ongoing criminal investigations and prosecutions. In my view, the need to protect ongoing criminal investigations and prosecutions is the most important public interest raised to justify the public interest immunity and non-disclosure to the plaintiffs.

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[52] The importance of this public interest is demonstrated by the fact that the parties, the R.C.M.P. and the A.G.B.C. agreed to the timeline of the Feburary 7, 2000 consent order to protect the investigation of Mr. Doughty. The fact that criminal charges were laid against Mr. Doughty following the investigation demonstrates why this public interest is so important.

[53] However, there are also significant interests favouring disclosure to the plaintiffs. In addition to the defendant Canada having access to the documents, it must be remembered that about 1,300 of approximately 2,500 pages of documents relate to Mr. Doughty. As has been noted, there is a strong likelihood that all of those documents will be disclosed to him while he is both a defendant in these proceedings and an accused person in criminal proceedings. Accordingly, both he and his counsel could have access to a great number of documents that will not be available to these plaintiffs without order of the court.

[54] The R.C.M.P. edited the documents extensively; the immunity claim was asserted over many of them. There is no evidence about specific investigations which require protection. The R.C.M.P. and the A.G.B.C. merely claim the immunity over several documents, without providing sufficient

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information for this court to properly balance the competing public interests.

[55] It may be possible to protect ongoing investigations while allowing disclosure to the plaintiffs. The public interest may be best served by ordering disclosure to the plaintiffs while imposing conditions on the plaintiffs' use of the documents.

[56] A proper balancing of the public interests involved requires that a judge review the particular documents (those identified in category "1"), and consider whether the public interest served by preventing disclosure to protect ongoing investigations and criminal prosecutions outweighs that served by disclosure to the plaintiffs.

Free and Frank Communication

[57] The R.C.M.P. asserts that protecting free and frank communication among the police, witnesses and Crown counsel is in the public interest. It claims that disclosure of these documents would undermine that goal. In Constable Thatcher's affidavit he identifies documents in categories "4" and "6" as falling under this claim.

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[58] The R.C.M.P. claims that the documents in category “6” contain discussions between the R.C.M.P. and Crown counsel. However, Constable Thatcher agrees in his August, 2000 affidavit that ongoing investigations would not be threatened if these documents were disclosed, and further that the solicitor – client privilege does not attach to them. The R.C.M.P. contends that the public interest served by encouraging frank communications justifies refusing disclosure to the plaintiffs.

[59] Given the important public interests favouring disclosure to the plaintiffs, and the various conditions that can be attached to the plaintiffs’ use of the documents, the public’s interest in facilitating frank communication cannot outweigh the need to ensure a fair trial for these litigants.

[60] The R.C.M.P. claims that the documents in category “4” stem from discussions between its members and the NIRS Task Force, and that police investigation tactics are revealed. Documents in category “4” will be dealt with by the procedure established for the documents in category “1” (see paragraph 56), and for the same reasons.

Protecting Third Parties

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[61] Finally, the R.C.M.P. asserts, in the public interest immunity claim, that immunity is required to protect third parties by ensuring that information they gave is not used for purposes other than that for which it was given. There is no clear evidence that information given to the R.C.M.P. by third parties was given on the basis that it be used for a particular purpose, for example, a criminal prosecution. There is no evidence that information given to the R.C.M.P. and disclosed in the context of this litigation would put such a person at risk or would otherwise be contra indicated. In this regard, Chief Joseph's affidavit must be given considerable weight.

[62] The public interest is served by allowing disclosure to the plaintiffs of relevant documents and imposing conditions on their use.

Common Law Privilege

Applicability of the Wigmore Test

[63] The final claim for privilege advanced by the R.C.M.P. and the A.G.B.C. is that a common law privilege attaches to many of the documents in issue. The test for a common law privilege requires a court to consider four questions, the

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last one being whether the interests served by protecting communications from disclosure outweigh the interests served by getting at the truth and disposing correctly of the litigation: **Slavutych v. Baker**, [1976] 1 S.C.R. 254; ***M.(A.) v. Ryan*** (1997), 143 D.L.R. (4th) 1 (S.C.C.). As McLachlin J. (as she then was) said in ***Ryan***, *supra*, this fourth question requires the court to assess the interests served by preventing disclosure. The court must weigh these interests against those served by allowing disclosure. The principles embodied in the test for the common law privilege add nothing to the preceding discussion, and do not extend the arguments presented by the R.C.M.P. and the A.G.B.C.

CONCLUSION

[64] At the root of the claim for public interest immunity is the issue of fairness. The concept of fairness is of course pivotal in maintaining respect for the administration of justice, which is clearly a public interest issue. To allow a defendant to this litigation to have unfettered access to documents potentially relevant to this litigation, while precluding the plaintiffs from having the same access, would fall far short of accomplishing the goal of ensuring that justice is not only done but is seen to be done. The

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presumption in civil litigation is that the parties have the same exposure to relevant documents.

[65] The submissions of the R.C.M.P. and the A.G.B.C. would effectively require retroactive application of a claim of public interest immunity. In my view, such an application would create a layer of unfairness in this litigation that is inconsistent with the public interest served by maintaining the integrity of the administration of justice. The arguments raised would have more legitimacy had they been asserted prior to disclosure to the defendant Canada.

[66] While the R.C.M.P. and the A.G.B.C. suggest in their submissions that the court's judgment on this motion could be pivotal in providing direction to the R.C.M.P. and to Attorneys General across the country faced with disclosure issues arising in other residential school civil litigation, in my view the outcome of this application will be of limited general assistance. The decision I must make is fact driven. The issue is discrete because of the unfettered disclosure to the defendant Canada and the potential for expansive disclosure to another defendant, while disclosure to the plaintiffs is highly restricted. The edited version of the documents given to the plaintiffs in accordance with the consent order of February 7, 2000, essentially renders them

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useless because the editing is extensive and seemingly indiscriminate.

[67] The plaintiffs are entitled to all relevant documents. Given the extensive editing by the R.C.M.P., it is impossible for this court to determine which, if any of the documents, are relevant. It is appropriate for a justice of this court to review the unedited documents and decide which documents are relevant. The only documents exempted from review are those referred to in paragraph 20 of Constable Thatcher's affidavit filed August 25, 2000, namely, documents numbered 31, 35, 36, 43 & 74.

[68] The arguments supporting an informant, common law, a general litigation privilege, and a privilege under the ***Young Offenders Act***, ***Freedom of Information and Protection of Privacy Act***, ***Privacy Act*** and the ***Access to Information Act***, are dismissed. The solicitor-client privilege is allowed only to the extent that documents 31, 35, 36, 43 and 74 of Constable Thatcher's affidavit, are not to be disclosed to the plaintiffs.

[69] The public interest immunity claim arising from the need to respect the Agreement is significant. So too is the public interest in ensuring fairness in this litigation. These competing interests are effectively balanced by attaching

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conditions to the plaintiffs' use of the relevant documents, not by refusing the plaintiffs' access to them. The "Draft Terms of Order" prepared by Mr. Paterson, place several restrictions on the use the plaintiffs can make of the documents, a copy of which is attached hereto and forms part of this judgment. The language and the spirit of the Agreement is reflected in the "Draft Terms of Order" thereby satisfying the public interest.

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[70] The "Draft Terms of Order" are the terms on which the plaintiffs may use any documents that the reviewing judge determines to be relevant unless otherwise ordered by the reviewing judge. Paragraph 1 of the "Draft Terms of Order" shall now read:

> The unedited documents delivered by the RCMP to Canada and presently deposited into Court in Victoria are to be reviewed for relevance by a Justice of the Supreme Court of BC.

Paragraph 3(b) shall now read:

> If potential witnesses are identified by the documents, counsel will not directly, or indirectly, approach any such witness without consent and agreement from the RCMP and, in the case of aboriginal witnesses, the PRSP, to approach the witness and determine if he or she is willing to speak to counsel.

[71] The only other public interest immunity raised that is persuasive is the need to protect ongoing investigations,

criminal prosecutions and investigative techniques. Scrutiny of the unedited documents is required to determine how to resolve the disclosure issue in a manner that best serves the public interest. The documents in categories “1” and “4”, earlier referred to, require scrutiny beyond whether or not those documents are relevant to the plaintiffs. If documents considered to be relevant by the reviewing judge fall within category “1” or category “4”, the reviewing judge must determine whether or not disclosure of any of those documents to the plaintiffs serves the public interest. It may be necessary to attach conditions to disclosure, which may differ from those in the “Draft Terms of Order” so as to best serve the public interest.

[72] In the result, a judge of this court will review the unedited documents (except for documents 31, 35, 36, 43 and 74), and will:

1. determine which, if any of the documents, are relevant;

2. if any of the relevant documents are in category “1” or category “4”, determine if they should be disclosed; and

3. order disclosure of all relevant documents which should be disclosed in accordance with the terms of the “Draft Terms of Order” or on such other terms as the circumstances require.

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[73] The reviewing judge (referred to in paragraph 1 of the "Draft Terms of Order") is the trial judge unless the parties apply and the court otherwise orders.

[74] This order applies to the documents referred to in Schedule "A" to the notice of motion filed January 24, 2000. Counsel adjourned the application regarding the documents in Schedule "B" to that motion.

"J.L. Dorgan, J."
The Honourable Madam Justice J.L. Dorgan

March 13, 2001 -- Memorandum to the Legal Publishers advising that on pages 5, 6, 7, 8, paragraph 4, the sub-paragraph numbering should read:

"1, 2, 3, 4, 5, 6, 7, 8, 9, 10"

December 21, 2000 -- ***Corrigendum to the Reasons for Judgment*** issued by Madam Justice Dorgan advising that this is a Corrigendum to my judgment dated December 21, 2000.

Paragraph 69 will be amended by inserting, after the words, "The Draft Terms of Order" prepared by Mr. Paterson, …" the following:

> "a copy of which is attached hereto and forms part of this judgment."

The "Draft Terms of Order" are added at the end of this ***Corrigendum***.

"DRAFT TERMS OF ORDER"

1. The unedited documents delivered by the RCMP to Canada and presently deposited into Court in Victoria are to be reviewed by a Justice of the Supreme Court of BC.

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2. Those documents which consist exclusively of privileged solicitor client communications as set out in paragraph 20 of the Thatcher affidavit, sworn 24 August, 2000 or which are, in their entirety, irrelevant to any issues raised in the present litigation are to be removed from the documents collection.

3. The rest and remainder of the documents are to be returned to counsel for Canada and listed and disclosed as relevant documents in its possession pursuant to Rule 26 of the Supreme Court Rules subject to the following terms:

   a. The documents are not to be shown to or discussed with any person other than counsel for the parties herein and their partners, agents and employees and, in particular, are not to be shown to their clients, or used in any proceeding, including examinations for discovery, without leave of the Court and, if leave be sought, notice is to be given to the RCMP and, where aboriginal persons are named in the document(s), the Provincial Residential School Project (“PRSP”);

   b. If potential witnesses are identified by the documents counsel will not approach any such witness without consent and agreement from the RCMP and, in the case of aboriginal witnesses, the PRSP, to approach the witness and determine if he or she is willing to speak to counsel;

   c. If the witness agrees to speak to counsel, leave of the Court is not required, subject to the provisions of paragraph 3(a) above;

   d. If the RCMP or, where applicable, the PRSP, do not consent to speak to a potential witness, or if the witness declines to be interviewed by counsel, counsel will not communicate with the witness without leave of the Court and, if leave be sought, notice is to be given to the RCMP and, where the witness is aboriginal, the PRSP;

   e. Where an aboriginal witness is interviewed pursuant to the provisions of this Order, the provisions of the Protocol Agreement, paragraphs E4,E5, E6, E8 and

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E9 on pages 5 and 6, as set out in Exhibit “A” to the Affidavit of Elisabeth Burgess, sworn 1 February, 2000, will guide the conduct of counsel;

f. Counsel will advise each other of their intention to interview a potential witness prior to communicating with the RCMP and the PRSP and will, where possible, conduct common interviews with aboriginal witnesses; subject to the right of any witness to refuse to speak to any counsel in the absence of an Order of this Court.

This ***Corrigendum*** was released from the Victoria Registry on March 19, 2001 and is date stamped accordingly.

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